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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 254

DIXIE PORTLAND FLOUR MILLS, INC.,
Petitioner,

vs.

STANIFER G. BYRD,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Tennessee, Eastern Section

REPLY TO BRIEF IN OPPOSITION

REASONS FOR REPLY.

Respondent has misunderstood the concept of the Questions Presented in the Petition and reply is necessary to correct his concept and to correct respondent's Statement of alleged "undisputed facts" which are either disputed facts or erroneously assumed facts.

The essence of the error in respondent's concept of the Questions Presented in the Petition is that he argues that petitioner attacks the actions of the trial judge in instructing the jury as the foundation for the abridgement of petitioner's constitutional rights. This is incorrect. Denial of

the petitioner's constitutional rights as stated in the Petition for Certiorari filed with the Supreme Court of Tennessee and with this Court, clearly established that these rights were first abridged by the action of the Court of Appeals of Tennessee and it is the judgment of that court which is sought to be reviewed. An integral part of the review of the judgment of that court is review of the action of the Supreme Court of Tennessee on Petition for Writ of Certiorari, Petition for Rehearing, and Application for Special Leave to File a Second Petition for Rehearing.

It is the inescapable duty of an intermediate court of review to apply the law of a state as expressed by the highest court of that state. It is also the right of litigants and their counsel to anticipate such application of the law. Application of the law by such courts in so radical and unforeseeable a manner as to rupture the outermost boundaries of the law as established by the recorded jurisprudence of this country warrants review by superior courts in which such law was promulgated. By the mere declaration that denial of certiorari denotes approval of the judgment below but not the basis upon which it was founded, can a state supreme court blindfold itself to the denials of petitioner's substantive federal constitutional rights contained in the Opinion of the Court of Appeals and inexorably threaded through the law of the case, without there being a violation of a litigant's constitutional rights in the state supreme court? Where the radical and unforeseeable application of a law by intermediate courts of appeal abridges federal constitutional rights, and those rights are asserted, a state court of last resort from whom relief is prayed, cannot, by its denial to grant certiorari, escape review of its action by this Court.

This is particularly true in Tennessee where the pronouncement of the court of last resort is that their denial of certiorari has only one meaning—that they agree with

the judgment of the Court of Appeals and such denial does not mean that they agree with the Opinion of the Court of Appeals upon which the judgment was founded. The oddity of this pronouncement is particularly apparent in the case here presented. It is the opinion of the Court of Appeals that forms the legal lifeline to its judgment. Petitioner is well aware that this Court reviews judgments, not opinions. However, that has never been taken to mean that the postulates of the opinion essential to the validity of the judgment could not abridge a litigant's constitutional rights.

Where the Opinion of the Court of Appeals premises its judgment upon their expression:—that because the accused, an innkeeper, told an invitee that he should keep his shotgun in the garage and the invitee, in storing the weapon, kills a third person by its negligent discharge, the innkeeper thus becomes a co-principal because of his instruction; would this Court allow affirmation of a judgment of negligent homicide, by such Court of Appeals, and then permit the state supreme court to deny certiorari to review federal constitutional questions raised because of the capricious application of the law to the case by the Court of Appeals? Such rationale is with a distinction but without a difference to the rationale of the judgment here.

The paradox of the Tennessee Supreme Court's announced effect of their denial of certiorari, in any given case, is contained in what they fail to say—if the Tennessee Supreme Court approves the judgment of a Court of Appeals by denying certiorari, what do they review to reach their approval of that judgment? If they review only what was presented to the Court of Appeals so that questions of correctness of the judgment follow parallel lines, then, perforce, petitioner had absolutely no review of the federal constitutional questions raised by the action of the intermediate court of appeals. Conversely, if they

review not only what was presented to the Court of Appeals but also that which is contained in the Petition for Certiorari before them, they have substantively and effectively accepted and reviewed the federal constitutional questions presented and denied petitioner relief by the announced approval of the intermediate court judgment. In either case, jurisdiction rests with this Court to review.

Respondent states that "the theory and insistence of each party to the suit as to the factual occurrence was given to the jury in the Court's charge (R. 1127-28)." This is less than a correct statement. There is a significant difference with respect to the manner in which the jury was instructed as to plaintiff's theory and as to defendant's theory. Failure of the Court of Appeals to reverse on that ground alone is the basis of petitioner's third Question Presented. The pertinent portions of the charge are set out below from the Record, pages 1127-28:

> "However, the Court instructs you that if you believe the theory and insistence of the plaintiff as to the *way and manner** in which this accident occurred, to be true from all of the proof as to all of the defendants . . . then the defendants would be guilty of negligence and your verdict would be in favor of plaintiff against all of the defendants."
>
> ". . . If you find that the theory and insistence of the defendants are true from all of the evidence or if you find that the evidence introduced by the plaintiff in support of its theory equally balances with the evidence introduced by the defendants in support of their insistence, then plaintiff's action against that defendant or those defendants would fail . . ."

This portion of the charge makes it demonstrably clear that the jury was compelled to find against all defendants if the *way and manner* in which the accident occurred was

* Emphasis supplied throughout.

found by them to be true. As discussed in the Petition, there was no dispute by any of the parties litigant as to the *way and manner* in which the accident occurred. The second paragraph of the instruction eliminates the words, "*way and manner* in which the accident occurred," when submitting the theory and insistence of the defendants to the jury. The theory and insistence of the defendants was drawn in issue and was in conflict upon *why* the accident occurred, not *how*. All parties agreed as to *how* it occurred. The jury was also instructed to find negligence from the mere happening of the accident, contrary to Tennessee law. The instruction thus contained the inherent vice of being a verdict directing instruction which contained a misstatement of the Tennessee law. As stated in the Petition, this error necessitated reversal under controlling Tennessee decisions and failure of the Court of Appeals to reverse, consistent with the rights of the petitioner to receive a trial in accordance with the settled course of judicial proceedings in Tennessee, is the action which abridged constitutional rights with respect to the third Question Presented.

The Statement in respondent's Brief avers that agency was proven by factual evidence. This is incorrect. The only aura of agency contained in the Record is an instruction as to the area to be used for parking which was given by petitioner's employee to the co-defendant Johnson on the occasion of his first entry upon petitioner's premises months prior to that day on which the accident occurred. No principle of agency, domestic or foreign, permits the application of *respondeat superior* under such circumstances.

The Statement continues with the averment that petitioner did not comply with ordinance regulations with respect to safety and that petitioner failed to install wheel stops which was an additional violation of applicable city ordinances. These statements ar in error. The respective

ordinances involved contain no safety requirements affecting the petitioner's use of the property on the day on which the accident occurred. The applicable city ordinances with respect to stops or barriers apply exclusively to the maintenance of a *public* parking lot. The height and width of the wall involved is not germane to the issue, nor does it constitute a violation of any duty owed by the petitioner.

Respondent concludes that petitioner offered no defense to his evidence. Petitioner does not understand the significance of this statement in the light of respondent having the burden of proof of petitioner's negligence, even under the law of Tennessee.

The Reply does not touch upon respondent's argument because that argument is material only to the Questions Presented in respondent's Brief which assume the facts contained in the Statement. The error of the material facts contained in the Statement reduces the Questions Presented to irrelevant expressions and, concomitantly, the argument lacks materiality to the issues raised in the Petition.

CONCLUSION.

For the reasons set forth in the Petition and Reply, petitioner again prays that this Court issue its writ of certiorari.

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